IN THE

# Supreme Court of the United States

OCTOBER TERM, 1943

No. [redacted] 34

THE SAGE STORES COMPANY, a corporation, and CAROLENE PRODUCTS COMPANY, a corporation,

*Petitioners,*

*against*

THE STATE OF KANSAS, *ex rel.* A. B. MITCHELL (substituted as Attorney General),

*Respondent.*

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

### I.

### Constitutionality.

The theme of the State's brief is that the statute is constitutional because Carolene may "reasonably be deemed"

a) to be detrimental to the public health, and

b) to produce deception upon customers.

Neither of these premises is sustained by the Record.

## A. Public Health.

There is neither evidence nor finding that Carolene is detrimental to public health. Indeed, there is no finding that Carolene is in the slightest respect deleterious or unwholesome. On the contrary, the finding is that each of the constituents of Carolene, and the compound itself, is wholesome and nutritious (Findings of Fact Nos. 12, 13, 16, R. 496-499). There is, at most, a finding that Carolene would be insufficient as an *exclusive* diet in the case *of infants* (Finding of Fact 53, R. 519). That, however, is no basis of criticism: the finding is that *no* food product, not even milk itself, should be used as an exclusive diet for infants (Finding 20, R. 502, 3).

In discussing the nutritional value of Carolene, the State, throughout its brief, cites from the opinion of this Court in the earlier *Carolene* case (304 U. S. 144), as if that were a judicial determination that the *present* product is a harmful one. Similarly, there are numerous quotations from the Congressional debates, preceding the adoption of the Federal Filled Milk Law in 1923, concerning the quality of filled milk, and these quotations, taken in their context, suggest that the Congressional references were to the present product. This is typical of the arguments which have created confusion in the decisions, by beclouding the fact that the Congressional debates related to the vitamin-deficient product, the nutritional defects in which were then believed to be irremediable, and that the earlier *Carolene* case sustained the right to ban a product compounded prior to the discovery of the vitamin-fortification process—a product which, by demurred, was admitted to be adulterated and injurious to public health. This confusion is evident from the indiscriminate way in which the earlier *Carolene* decision in this Court has been cited by courts, as it is in the State's brief, to sustain filled milk statutes as against the *present* product, which is *not* adulterated and is *not* injurious to public health.

In the course of its brief, the State adverts to cases in which filled milk laws have been sustained. In reference to these cases it should be noted:

*Poole, etc.* v. *Breshears*, 343 Mo. 1133 (brief, p. 14).

In a later case (*State ex rel. McKittrick* v. *Carolene*, 346 Mo. 1049), the same court held the Missouri filled milk statute inapplicable to Carolene.

*Carolene* v. *Mohler*, 152 Kan. 2 (brief, p. 14).

This case involved a product containing an oil which the court found was not shown to be harmless, or a pure, nutritious and healthful food (152 Kan. 5). As Justice Wedell said in the dissenting opinion below (R. 668), the court did not, in the *Mohler* case, analyze and construe the provisions of the Law to determine whether it constituted a reasonable health measure.

*Setzer* v. *Mayo*, 150 Fla. 734 (brief, p. 14).

This was a four to three decision on the pleadings, holding the Florida statute constitutional on its face, but even the majority pointed out that, as to Carolene, constitutionality would depend on what the relators would be able to show as to the quality of their product.

*Carolene* v. *Hanrahan*, 291 Ky. 417 (brief, p. 14).

In this case the Kentucky court held the decision of this court in the earlier *Carolene* case (304 U. S. 144) was "controlling" on the question of constitutionality, ignoring completely the fact that the earlier case came here on a demurrer which admitted that the product there involved was adulterated and injurious to health.

*U. S.* v. *Hauser*, 140 F. (2) 61 (brief, p. 15):

This is the decision of the Circuit Court of Appeals for the Fourth Circuit, with respect to which a petition for certiorari is now pending in this court (October Term No. 674).

*Carolene* v. *Wallace*, 27 F. Supp. 110, aff'd. 307 U. S. 612;

*Carolene* v. *Wallace*, 30 F. Supp. 266, aff'd. 308 U. S. 506 (brief, pp. 14, 20).

These opinions were written on preliminary motion, and on final hearing, respectively, in an action brought to enjoin criminal prosecutions under the Federal Act. On both occasions, the court held that no ground for equitable relief had been shown, but observed that proof that Carolene did not fall within the rationale of the statute would be a defense on the merits to any criminal prosecution.

*Hebe* v. *Shaw*, 248 U. S. 297 (brief, p. 12).

This case dealt with a skimmed milk product as compounded prior to the discovery of the vitamin-fortification process. The Court held, three of the justices dissenting, that the statute was constitutional as applied to Hebe. Insofar as the case deals with the right to ban an innocent product, it must be read in the light of the limitations established by the later case of *Weaver* v. *Palmer*, 270 U. S. 402.

As opposed to the cases relied on by the State, are the following in which filled milk statutes were held

unconstitutional or inapplicable to Carolene:

*People* v. *Carolene*, 345 Ill. 166;
*Carolene* v. *McLaughlin*, 365 Ill. 62;
*Carolene* v. *Thompson*, 276 Mich. 172;
*Carolene* v. *Banning*, 131 Neb. 429;
*State ex rel McKittrick* v. *Carolene*, 346 Mo. 1049.

In the State's brief, the justification for the statute, as far as quality of the product is concerned, is grounded on Carolene's alleged failure to measure up, nutritionally, in certain respects, to milk. That contention overlooks the fact that food products, themselves wholesome and nutritious, may not be banned simply because they are not as nutritious as milk. If such a criterion were adopted, then virtually every other food product could be banned, because there is none which could not be shown, in some respects, to be less nutritious than milk. The correct test of the right to ban a product is not its nutritious value as compared to milk or, for that matter, as compared to any other food product: the correct test is whether or not the product under consideration is wholesome and nutritious.

**B. Deception.**

The evidence on this subject is set out on pages 19-20 of our principal brief and there is no need to repeat it here. Suffice it to say that there is neither claim nor proof that petitioners were guilty of deception in the marketing of Carolene; that no finding of fraud or deception was made by the Commissioner or by the learned court below, and that the findings show affirmatively that there is no appreciable misunderstanding on the part of purchasers, or deception on the part of dealers, in the marketing of Carolene.

Thus the record shows that Carolene is a wholesome and nutritious product, sold without fraud on the public. Such a product, we submit, may not be denied the right to pass in interstate commerce.

## II.

### Regulation, as against Proscription.

Even if it were feared that some dealers might attempt deception, the remedy in the case of a wholesome product would lie not in proscription, but in regulation. Indeed, such regulation already exists in Kansas (see our principal brief, p. 21).

The cases on which the State relies do not aid it. The *Mohler* case (brief, p. 38), as previously noted, dealt with a product containing an oil which the court found was not shown to be harmless, or a pure, healthful and nutritious food (152 Kan. at p. 5). Moreover, the court in that case did not undertake to decide whether or not the statute was a reasonable health measure (see dissenting opinion of Wedell, J., below) (R. 668).

The *Hebe* case, 248 U. S. 297 and *U. S.* v. *Carolene*, 304 U. S. 144 (brief, pp. 38-9) dealt with skimmed milk products as compounded prior to the discovery of the vitamin-fortification process. In the *Hebe* case, Mr. Justice Holmes referred to the product as "inferior" (p. 302), and in *U. S.* v. *Carolene*, the demurrer admitted that the product was adulterated and injurious to public health. Such cases are no authorities for banning the shipment of a product which is wholesome and nutritious.

The *Weaver* case (270 U. S. 402) holds that proscription of an innocent product is beyond the power of Congress, and that regulation is the appropriate remedy. The State argues (brief, p. 41) that the *Weaver* case is

inapplicable because it dealt with quilts and comfortables, and not with food. That, we submit, is a dissimilarity which creates no legal difference. The State grudgingly admits (brief, p. 41) that the *Weaver* case would be applicable if the question here were whether or not the refining of one of the constituent parts of the product converted it from an unsanitary into a sanitary product. The attempted distinction is specious: if regulation, not proscription, is the appropriate remedy to meet a possible unwholesomeness in a constituent part of a product, it is difficult to see why the same rule should not apply to the product itself. Moreover, we are not dealing with a product as to whose wholesomeness there is any debate: the finding is that Carolene is wholesome and nutritious (Finding of Fact 53, R. 519). Such a product, we submit, may not be proscribed (*Schollenberger* v. *Pennsylvania*, 171 U. S. 1; *Weaver* v. *Palmer*, 270 U. S. 402).

## III.

### Justice Parker's Participation.

The State admits (brief, p. 36) that Mr. Parker, as Attorney General, had discretion to determine whether or not to institute the proceeding. Of course, Mr. Parker's relation to the case went much further: even if he did appoint a special assistant, the appointee never ceased to be under Mr. Parker's supervision and control, until Mr. Parker was elevated to the Bench.

We are not required, in this case, to argue the rule of "necessity". There was no "necessity" for participation in this case by Justice Parker. There was a tribunal with power to hear the proceeding and that tribunal heard it. Under well-recognized rules, if that tribunal were evenly divided, there would follow a judgment that no right to the relief demanded had been established. Such

a determination is as complete and effective as if the court had unanimously determined that no cause of action had been established. There was, accordingly, no "necessity" for Mr. Justice Parker's tilting the scale by throwing the weight of his decision in support of the suit which he, as Attorney General, had brought. By his own vote, as Judge, he converted what would have been a judgment denying the relief which, as suitor, he had sought, into a judgment granting it.

The cases cited by the State are readily distinguishable.

*Evans* v. *Gore*, 253 U. S. 245 (brief, p. 34), involved no question even remotely analogous to the one now under discussion. Plaintiff there questioned the right of the Collector of Internal Revenue to include plaintiff's salary as a District Judge in computing his taxable income. This court expressed its regret that it was required to pass on the question "because of the individual relation of the members of this court to the question", but none of the Justices had any interest in the suit, as party or as attorney; they were affected only as every Federal Judicial officer would be affected by a ruling on a question of constitutional law. Moreover, to decline jurisdiction in *Evans* v. *Gore* would have meant not merely a temporary inability to pass on the question, but one which would continue for all time and irrespective of change in the personnel of the Court and, as Mr. Justice Van Devanter remarked (p. 248), the Congressional debates showed that Congress intended that the Supreme Court should pass on the question.

There was no question of personal interest or personal association in the case in *Brinkley* v. *Hassig*, 83 F. (2) 351 (Government's brief, p. 34). The claim there was that members of an administrative tribunal—the Kansas

State Medical Board—were prejudiced against the respondent doctor because they had heard, over the radio, the very broadcasts for the transmission of which he was charged with unprofessional conduct. There is dicta in the case with respect to the right of courts, though interested, to sit in cases where no other tribunal is available, but no such question was involved. The Court noted that knowledge of the broadcasts by the board members was "well nigh inevitable", in view of the widespread use of radio receiving sets, and it held that such knowledge created no disqualification in the board members.

To sustain Judge Parker's participation in the decision below would, we submit, justify grave suspicions in the minds of reasonable men as to the sanctity of our judicial process. We believe that the course to be followed was indicated by Mr. Justice Jackson in *Schneiderman* v. *U. S.*, 320 U. S. 118, where he said (p. 207):

> "I do not participate in this decision. This case was instituted in June of 1939 and tried in December of that year. In January, 1940, I became Attorney General of the United States and succeeded to official responsibility for it (309 U. S. p. iii). *This I have considered a cause for disqualification and I desire the reason to be a matter of record.*" (Italics ours.)

In the *Schneiderman* case, Mr. Justice Jackson's refusal to participate did not interfere with the disposition of the case by the Court. However, the Justices of this Court have indicated that they would not recede from the position taken by Mr. Justice Jackson in the *Schneiderman* case, even though their refusal to participate resulted in the failure of a quorum and the consequent indefinite postponement of consideration (*U. S.* v. *Aluminum Co. of America*; *North American Co.* v. *Securities*

*and Exchange Commission*). Certainly if that be the course to follow, even in such circumstances, it is the course to be followed in cases such as ours, where disqualification does not prevent immediate consideration and determination by the rest of the Court.

## CONCLUSION.

**The petition for a writ of certiorari should be granted.**

March 29, 1944.

Respectfully submitted,

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